**NKM PROPERTIES SDN. BHD.**

**v.**

**ABDUL GHANI AHMAD & ANOR.**

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[CIVIL SUIT NO. A 20 OF 1985]
31 JULY 1986

***CIVIL PROCEDURE:*** *Application to strike out claim - Bank loan secured by charge - Bank officer authorised under power of attorney to execute charge - Two power of attorneys with same registration number - Whether power of attorney valid - Whether charge valid.*

This was an application by the applicant/defendant to strike out the plaintiff's claim. The respondent/plaintiff had filed a claim and prayed *inter alia* that a charge executed by them to secure a loan given by the second applicant was void as the first applicant who was an officer of the second applicant had no authority to execute the charge on behalf of the second applicant. The respondent contended that the power of attorney which conferred authority on the first applicant was a forgery on the grounds *inter alia* that the same registration number had been granted by the High Court to another power of attorney and that it was stamped more than two years after it was executed.

**Held:**
The power of attorney was valid. It was executed on 13 January 1978, stamped on 9 February 1978 and registered in the High Court as No. 946/78. The same registration number was given to another power of attorney due to a clerical mistake.

*[Application allowed with costs to be taxed.]*

*For the plaintiffs - M.S. Murthi; M/s. Murthi & Partners*
*For the defendants - Tan Poh Meng; M/s. Nik Hussain, Ibrahim & Abdullah*

**JUDGMENT**

**Harun J:**

The plaintiff company obtained a loan of RM1.8 million from the second defendant bank (the bank). As security for the loan, they executed a charge of their lands to the bank. The plaintiffs could not repay the loan and the bank obtained an order of sale of the lands by public auction from the High Court on 7 December 1982. The plaintiffs appealed to the Federal Court against the order of sale on the ground that the loan was disbursed to the plaintiffs before the memorandum of charge was executed. The Federal Court dismissed the appeal with costs as the grounds of appeal were unconscionable and misconceived because the plaintiffs had obtained the loan at their own urgent request and the charge instrument itself stated that they acknowledge the receipt of the sum of RM1.8 million and that otherwise the charge was properly registered under the provisions of the National Land Code. The plaintiffs then applied for leave to appeal to the Privy Council but this application was refused. That was on 25 February 1985.

The bank then proceeded to execution. The day before the new date of the public auction, the plaintiffs obtained a stay order on the ground that there were caveats on the land which had been obtained ex-parte. In the meantime, the plaintiffs filed the present writ on 26 September 1985 claiming that the memorandum of charge executed on 30 June 1980 to secure the RM1.8 million loan is null and void and could not therefore confer any registered interest

on the bank in respect of the plaintiffs lands because the first defendant (who is an officer of the bank) had no authority to execute the charge on behalf of the bank. It is contended by the plaintiffs that the power of attorney used by the first defendant to execute the charge is a forgery for the following reasons:

(a) It has not been registered under the Powers of Attorney Ordinance 1949.

(b) It was purportedly executed on 18 January 1978 but was only stamped at the Stamp Office on 9 July 1980.

(c) It purports to have been registered at the Kuala Lumpur High Court as power of attorney no: 946/78 which number was allocated to the Perwira Habib Bank in respect of a power of attorney dated 1 March 1978.

The plaintiffs accordingly pray for declarations that:

(i) The power of attorney is null and void on the ground of want of registration under the Powers of Attorney Ordinance 1949;

(ii) Further and/or in the alternative the said purported power of attorney is void on the grounds of the defendants' fraud, forgery and false pretence.

The defendants in their statement of defence deny all allegations of fraud, forgery and false pretence and say that:

(a) The power of attorney was executed on 18 January 1978 and stamped on 9 February 1978.

(b) A copy of the power of attorney was retained by the Registrar of Titles, Seremban for the purpose of registering the charge and stamped on 9 July 1980.

(c) The power of attorney is valid as it has been properly authenticated and deposited in the Kuala Lumpur High Court in accordance with the provisions of the Powers of Attorney Ordinance 1949.

On 23 November 1985, the plaintiffs filed a summons-in-chambers to strike out the defence and prayed for judgment in their favour. On 29 November 1985 the defendants filed a summons-in-chambers to strike out the plaintiffs' claim. By consent, the defendants' application was heard first.

At the hearing, events took a different turn. Mr. Murthi for the plaintiffs said that the object of the present exercise is to determine whether interest payable on the debt is 8% or 10%. The plaintiffs admit liability to pay the debt but if the power of attorney is not valid then the contractual interest has no force. In that event judgment interest at 8% only is payable. I then asked if Mr. Murthi has seen the original of the power of attorney. He said he had not, whereupon Mr. Tan produced the original. It appears that through a clerical error in the High Court Registry two powers of attorney had been allocated the same number viz. that granted by Perwira Habib Bank referred to in the plaintiffs' statement of claim and the other the subject-matter of the present case. That of Perwira Habib Bank is still in force but that granted to the first defendant had since been revoked and the practice of the High Court Registry is to return the power of attorney to the grantor once it is revoked. This was the reason why Mr. Murthi's earlier search at the High Court Registry proved futile.

Mr. Murthi then said if he had been shown the original in the first place he would not have instituted this suit. The short answer to that on being served the statement of defence asserting that the defendants had a valid power of attorney at the material time, the plaintiffs'

solicitors ought to have asked for further and better particulars and in particular to have sight of the power of attorney. The solicitors did not do that. There was in fact no communication between the parties with regard to this matter before the suit was filed.

The impugned power of attorney was undoubtedly valid and was in force at the material time. This case stands or falls on the validity of this document. In these circumstances, I dismissed the claim. As regards costs, Mr. Murthi argued that it was not the fault of the client or the solicitors that there were identical numbers for two powers of attorney. Further, the defendants failed to show the original power of attorney to the plaintiffs. There are no merits in this argument because the plaintiffs launched into litigation without adequate inquiry. On the other hand, the defendants have been frustrated at every turn during the last three years in their attempts to recover their money. I accordingly awarded costs against the plaintiffs to be taxed.

Also found at [1988] 2 CLJ 96